

NTSB Order No. EA-4037

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of November, 1993

Respondent .

Docket SE-12204

¹An excerpt of the hearing transcript containing the initial decision is attached.

91.13(a), 91.119(a), and 91.119(b) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.² The Administrator alleges that on October 6, 1990, while operating Civil Aircraft N52432, a Cessna 172, on a passenger-carrying flight, respondent repeatedly operated his aircraft over Bobcat Stadium, a college sports arena, at an altitude of 250 to 300 feet, when thousands of spectators were present in the stadium for a football game.

Respondent attacks the sufficiency of the evidence in his appeal, arguing that inconsistencies between the Administrator's witnesses' testimony require that we overturn the law judge's credibility findings in their favor. Respondent also asserts that he was prejudiced by the Administrator's use of a photograph of his aircraft, when a proper foundation for its admission had not first been made. Finally, respondent argues that he was denied a fair hearing because the Administrator presented live

²FAR §§ 91.13(a) and 91.119(a) and (b) provide:

" § 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft."

testimony and he presented only statements of witnesses who claimed they were present at the stadium and that they did not see a low-flying aircraft. Respondent requests a rehearing so that he may present live witnesses, and so that he may be represented by counsel. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's initial decision.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. For the reasons that follow, we will deny respondent's appeal.

The Administrator's case consisted of the testimony of several witnesses who claim that they saw the incident. Sergeant Allen, an officer with the Southwest Texas State University Police Department for 19 years, was in charge of the police and guards for the game. He testified that at about 7:00 p.m., just before kick-off, he observed a high-winged aircraft which was white with a dark stripe, come over the stands at about 300 feet and 150-200 feet laterally. He testified that it was close enough so that he could see a white male with short dark hair in the right seat of the aircraft, waving. The aircraft made a circling maneuver and came back over the stadium again, at an altitude of 300 feet.³ Sergeant Allen observed that the

³Sergeant Allen testified that he based his altitude estimate on the fact that he knows that the recently installed light poles in the stadium are 120 feet high.

aircraft headed towards San Marcos Airport, and he notified Officer Benjamin to go there and try to identify the pilot. Sergeant Allen testified that he never lost sight of the aircraft. He saw it descend into the traffic pattern and make a straight-in approach to the airport.

Officer Benjamin, who was in the parking lot about 100 yards from the end zone, estimates that the aircraft was about twice the height of the light poles when he observed it. On the next pass he saw, the aircraft appeared to go through the stadium at an altitude which was so low that the aircraft appeared to Officer Benjamin to barely clear the tops of the light poles. Officer Benjamin also describes the aircraft as light with a dark strip and wings over the cab.

According to Officer Benjamin, he arrived at the airport before the aircraft had landed. A person in the operations office advised him that only one aircraft had taken off that night, the aircraft that was just then landing. Officer Benjamin approached the aircraft as it taxied to a stop. The time was about 7:15 p.m. As the passengers deplaned, he asked which one of them was the pilot. Respondent identified himself as the pilot. He asked respondent if he had been flying over Bobcat Stadium in this aircraft and respondent admitted that he had. Officer Benjamin testified that respondent claimed that he was at an altitude of 500 feet above ground level, and that this

(..continued)

altitude was in compliance with the FAR.⁴

Colonel Saboski, the Chairman of the University's Aerospace Studies Department and an active duty Air Force pilot for 26 years, attended the game on October 6, 1990. He testified that he observed a Cessna 172, single engine, high-wing, fixed tricycle landing gear, white or beige aircraft, with two horizontal fuselage stripes in black and yellow, "buzzing" the stadium at approximately 7 p.m. (TR 101-102). Although Colonel Saboski was not certain of the direction from which the aircraft came, he saw it swing out and pass over the stadium, heading from north to south, and clearing the bleachers by no more than 200 to 300 feet. He estimates its altitude at approximately 400 to 450 feet above ground level. On the second pass which he observed he believes the aircraft was as low as 150 feet. Colonel Saboski testified that he was concerned that there was no place to land safely in the event there was an engine failure. Colonel Saboski has over 500 hours of flying experience in Cessna aircraft. He testified that during most of his years in the Air Force he was required to supervise flying operations from an airfield, and he

⁴When shown a photograph of a N52432 by the Administrator's counsel, Officer Benjamin testified that it was the aircraft he observed on the day in question. Respondent did not object to the admission of the photograph as Administrator's Exhibit C-1. (TR-95). In fact, respondent later testified that the aircraft depicted in this exhibit was the aircraft he operated that day. (TR-96). Respondent's claim on appeal that the admission of the photograph was erroneous is without merit, since he failed to object to either its use or its admission at the hearing. In any event, in light of the abundance of evidence identifying the aircraft, including respondent's own admissions, there is no doubt that N52432 was the aircraft observed by the witnesses.

would often have to estimate distances and altitudes from a ground perspective. (TR-100). Colonel Saboski has retired since this incident, and is now employed as a pilot for American Eagle Flagship Airlines.

Finally, Officer Walsh, another University police officer, testified that he was on the sidelines of the field. From his perspective, the aircraft appeared to be not far above the light poles on the second pass he observed. He estimates the aircraft was then at 200 to 250 feet. The last pass appeared to him to be a deliberate dive into the stadium. (TR-132).

Respondent admits that he flew the aircraft depicted in Administrator's Exhibit C-1 on October 6, 1990. He also admits that his passengers asked him to fly by the stadium to see what was going on there. However, he claims that he never flew more than 1000 feet laterally from the stadium, and that he never flew below an altitude of 800 feet. He insists that he told his passengers that he could not go below 1,000 feet or 500 feet above obstacles, and that this is what he told Officer Benjamin.

Respondent admits that a passenger did wave out the window on the third pass. (TR-157). Respondent offered into evidence statements from individuals who also claim to have been at the stadium at the time in question, but who swear that they do not recall seeing a low-flying aircraft.

The law judge found that the Administrator's witnesses were the least self-serving and the most disinterested, and he made a credibility determination in their favor. (TR-183). He affirmed

all of the FAR violations alleged in the complaint, and, noting that respondent's operation had the potential for a catastrophic tragedy, he affirmed the sanction of a 180-day suspension of respondent's private pilot certificate. We adopt the law judge's findings as our own.

Board precedent is clear that credibility determinations are generally within the exclusive province of the law judge and will not be disturbed in the absence of arbitrariness, capriciousness, or some other compelling reason. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Respondent offers us no persuasive reason to disturb the law judge's findings in favor of the Administrator's witnesses in this case. The inconsistencies he notes in their testimony are of little consequence. All of the witnesses observed a light-colored, high-winged aircraft with at least one dark stripe, passing over the stadium at extremely low altitudes. The variances in their observations can easily be ascribed to the fact that each witness stood at a different vantage point when he observed the aircraft. Nor was there any confusion over the flight path which the aircraft took. The record is clear that these claimed inconsistencies are explained by the fact that not every witness noticed every one of respondent's passes. As to the accuracy of their altitude estimates, Sergeant Allen's knowledge that the light poles were 120 feet high and Colonel Saboski's experience as a pilot and an aviation instructor make their estimates persuasive. As to the veracity of their testimony, the law judge was in a position to

hear the witnesses and observe their demeanor, and respondent does not suggest a reason why any of the witnesses would fabricate their testimony. In any event, respondent does not dispute that he was operating a light-colored, high-winged aircraft with a dark stripe across its fuselage, in the area of the stadium on the night in question. His only claim is that he was west of the stadium and laterally at least 1000 feet away. This claim, however, is belied by his own admissions to the police, and it is not corroborated by any of the other evidence.

In conclusion, in our view, the evidence supporting the Administrator's allegations is overwhelming, and the law judge's initial decision should be affirmed.⁵

⁵We reject respondent's request for another opportunity to litigate this certificate action. There is no evidence in this record that he was denied a fair hearing. He was advised by the Manager of the Office of Administrative Law Judges in the acknowledgment of his appeal that it was advisable to hire an attorney, but he apparently chose not to do so. The law judge gave him specific instructions on the procedural aspects of the case, and respondent exercised his right to cross-examine the Administrator's witnesses quite effectively. As the Administrator notes in his reply brief, we have previously ruled that the possibility that professional counsel would have exercised a respondent's right to present evidence differently or more effectively than the respondent himself does not provide a basis for a rehearing where the respondent elected to proceed to hearing without benefit of counsel. Administrator v. Dudek, 4 NTSB 385, 386 n.5 (1982).

ACCORDINGLY, IT IS ORDERED THAT:

1. 1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 180-day suspension of respondent's private pilot certificate shall begin 30 days from the date of the service of this order.⁶

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

⁶For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).